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Sean O'Casey Patterson v Chan Hoong Poh & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01Q–03 OF 2010
ARIFIN ZAKARIA CJ (MALAYA), JAMES FOONG AND ZULKEFLI FCJJ
27 JANUARY 2011

Family Law — Children — Adoption — Registration of adoption under Registration of Adoption Act 1952 — Whether registration of adoption valid — Whether requirements for adoption under the Registration of Adoptions Act 1952 satisfied — Whether consent of biological father should have been obtained for the adoption — Whether where both biological parents living, consent of both parents must be sought — Welfare of child — Whether registration to be set aside — Whether fit and proper case to dislodge child from adopters

Family Law — Children — Legitimacy — Application by biological father to insert his name in child's birth certificate — Mother of child legally married to another man when child was conceived

The appellant, an American citizen, claimed that he and the first respondent were married in 1998 in Las Vegas. The first respondent later gave birth to the appellant's son ('J') on 21 March 2000 in Kuala Lumpur. The appellant claimed that thereafter he made numerous trips to Malaysia to visit the first respondent and J and gave them money. The appellant later came to know that J's birth certificate stated the name of one Bart Van Hoek ('Bart') as the father. The first respondent had had a previous relationship with Bart. The DNA profiling test showed that the appellant was the biological father of J. In the circumstances, the appellant went to the Jabatan Pendaftaran Negara to rectify the father's name in J's birth certificate. There the appellant discovered that the second respondent (sister of the first respondent) and the third respondent (the second respondent's husband) had on 18 February 2004 adopted J under the Registration of Adoption Act 1952 ('Act 253'). The second and third respondents being Muslims had also converted J. The appellant therefore filed an originating summons in the High Court praying, inter alia, for the following orders: (a) a declaration that the appellant was the biological father of J; (b) that the register be rectified to name the appellant as J's father in the birth certificate; (c) that J's name be changed to his original name; (d) a declaration that J's adoption by the second and third respondents was null and void and as such be set aside; (e) that the appellant be granted sole and exclusive guardianship, custody, care and control of J; (f) a declaration that the conversion of J into the Islam religion was null and void; and (g) that J be

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delivered to the appellant immediately. The appellant claimed that J's adoption was invalid on the grounds that Act 253 is not applicable to Muslims; lack of consent by biological parents and conditions under s 6 of Act 253 had not been fulfilled. The High Court granted a declaration that the appellant was the biological father of J and ordered the register be rectified to name the appellant as J's father in the birth certificate. The other prayers were dismissed. The appellant's appeal to the Court of Appeal was dismissed. The Court of Appeal further reversed the High Court order to rectify the birth certificate. Hence the appellant filed this appeal to the Federal Court, raising the following questions: (a) whether the appellant's consent should have been obtained for the registration of adoption of J under Act 253; (ii) whether s 6 of Act 253 should be read such that where both parents are living, both their consent should be sought for the registration of adoption of a child under Act 253; (iii) whether in dispensing with consent of any parent to the registration of the adoption under Act 253, the welfare principle which the registrar must apply in exercising his discretion under the proviso to s 6 of Act 253 is the welfare of the child in adoption cases and not custody cases; and (iv) whether the rights of the appellant remained and were not extinguished despite the registration of the adoption of the child.

Held, dismissing the appeal with costs:

(1) At the time when the second and third respondents made their application to register the adoption of J, the appellant was not known to be the biological father of J. J's father was listed in J's birth certificate as Bart. It was only after the adoption was made and subsequent DNA test conducted, that the appellant was confirmed as the biological father of J. If the appellant was not known or confirmed to be the father of J when the application for the registration of the adoption was made, then his consent was irrelevant. By this deduction, the answer to the first question was in the negative (see para 38).

(2) Section 6 of Act 253 cannot be interpreted to add a qualification that the other parent is 'no longer alive'. There is just no word or words to this effect in this section. This section plainly says 'or one of the parents'. With such description, it simply means any one parent without the need to prove that the other is either dead or cannot be found. When words are precise and unambiguous, the literal and strict construction rule must apply. We cannot read or imply into the laws what is not there. The answer to the second question was in the negative (see paras 41–42 & 52).

(3) The meaning of welfare must be considered in the widest sense and all factors necessary to be taken into account must be weighed against one another to arrive at a decision. It is impossible to lay down any specifics

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since circumstances in each case are so infinitely varied. The answer to the third question was in the positive (see para 58).

(4) All questions before the court centred on the right of the appellant and the validity of the adoption. None touched on the aspect of conversion of J to Islam. The court therefore refused to entertain the last issue raised by the appellant (see para 73).

(5) The Court of Appeal had erred in revoking the second order of the High Court in respect of rectifying J's birth certificate to reflect the appellant as the father of J. This part of the order of the Court of Appeal was set aside and the second order granted by the High Court was reinstated (see para 74).

[Bahasa Malaysia summary

Perayu, warganegara Amerika, mendakwa bahawa dia dan responden pertama telah berkahwin pada tahun 1998 di Las Vegas. Responden pertama telah melahirkan anak lelaki perayu ('J') pada 21 Mac 2000 di Kuala Lumpur. Perayu mendakwa selepas itu dia seringkali datang ke Malaysia untuk melawat responden pertama dan J dan memberi mereka wang. Perayu kemudian mendapat tahu bahawa sijil kelahiran J menyatakan nama Bart Van Hoek ('Bart') sebagai bapa. Responden pertama sebelum ini telah menjalin hubungan dengan Bart. Ujian profil DNA menunjukkan bahawa perayu adalah bapa biologi J. Dalam keadaan berikut, perayu telah pergi ke Jabatan Pendaftaran Negara untuk membetulkan nama bapa dalam sijil kelahiran J. Di situ perayu mendapat tahu bahawa responden kedua (kakak responden pertama) dan responden ketiga (suami responden kedua) telah pada 18 Februari 2004 mengambil J sebagai anak angkat di bawah Akta Pendaftaran Pengangkatan 1952 ('Akta 253'). Responden-responden kedua dan ketiga yang beragama Islam juga telah menukar agama J. Perayu dengan itu telah memfailkan saman pemula di Mahkamah Tinggi memohon, antara lain, untuk perintah-perintah berikut: (a) deklarasi bahawa perayu adalah bapa biologi J; (b) agar buku daftar diperbetulkan kepada nama perayu sebagai bapa J dalam sijil kelahiran; (c) agar nama J ditukar kepada nama asalnya; (d) deklarasi bahawa pengambilan J sebagai anak angkat responden-responden kedua dan ketiga adalah terbatal dan tidak sah dan oleh demikian diketepikan; (e) agar perayu diberikan penjagaan, pemeliharaan dan kawalan ke atas J; (f) deklarasi bahawa penukaran agama J kepada agama Islam terbatal dan tidak sah; dan (g) agar J diserahkan kepada perayu dengan segera. Perayu mendakwa bahawa pengambilan anak angkat J adalah tidak sah atas alasan bahawa Akta 253 tidak terpakai kepada Muslim; tidak mendapat persetujuan ibubapa biologi dan syarat-syarat s 6 Akta 253 tidak dipenuhi. Mahkamah Tinggi telah memberikan deklarasi bahawa perayu adalah bapa biologi J dan memerintahkan buku daftar diperbetulkan kepada nama perayu sebagai bapa J dalam sijil kelahiran. Permohonan lain ditolak. Rayuan perayu ke Mahkamah Rayuan telah ditolak. Mahkamah Rayuan seterusnya mengakas perintah

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Mahkamah Tinggi untuk memperbetulkan sijil kelahiran itu. Justeru itu perayu telah memfailkan rayuan ini ke Mahkamah Persekutuan, dengan menimbulkan persoalan berikut: (a) sama ada persetujuan perayu patut diperoleh untuk pendaftaran pengambilan anak angkat J di bawah Akta 253; (ii) sama ada s 6 Akta 253 patut dibaca agar di mana kedua-dua ibubapa yang masih hidup, dapat memberi persetujuan bersama untuk pendaftaran pengambilan anak angkat kanak-kanak di bawah Akta 253; (iii) sama ada tanpa mendapat persetujuan ibubapa untuk pendaftaran pengambilan anak angkat di bawah Akta 253, prinsip kebajikan yang patut diamalkan oleh pendaftar dalam melaksanakan budi bicara beliau di bawah proviso s 6 Akta 253 adalah kebajikan kanak-kanak dalam kes-kes pengambilan anak angkat dan bukan kes-kes penjagaan; dan (iv) sama ada hak-hak perayu kekal dan tidak lenyap meskipun berlaku pendaftaran pengambilan anak angkat.

Diputuskan, menolak rayuan dengan kos:

(1) Pada masa responden kedua dan ketiga membuat permohonan mereka untuk mendaftar pengambilan anak angkat J, tidak diketahui bahawa perayu merupakan bapa biologi J. Di dalam sijil kelahiran bapa J dinyatakan sebagai Bart. Hanya selepas pengambilan anak angkat dibuat dan berikutan ujian DNA dilakukan, perayu telah disahkan sebagai bapa biologi J. Jika perayu tidak diketahui atau disahkan sebagai bapa J semasa pendaftaran pengambilan anak angkat dibuat, maka persetujuannya tidak relevan. Berdasarkan pendekatan ini, jawapan kepada soalan pertama adalah bersifat negatif (lihat perenggan 38).

(2) Seksyen 6 Akta 253 tidak boleh ditafsirkan sebagai menambah kelayakan bahawa salah satu daripada ibubapa 'no longer alive'. Tiada perkataan atau perkataan-perkataan yang memberi kesan tersebut dalam seksyen ini. Seksyen ini hanya menyatakan 'or one of the parents'. Berdasarkan gambaran ini, ia hanya bermaksud bahawa salah satu daripada ibubapa tidak perlu membuktikan bahawa yang seorang lagi telah meninggal dunia atau tidak dapat dikesan. Apabila perkataan-perkataan adalah tepat dan tidak taksa, rukun pentafsiran secara harfiah dan ketat mesti terpakai. Kita tidak boleh membaca atau mentafsir undang-undang yang tidak dinyatakan. Jawapan kepada soalan kedua bersifat negatif (lihat perenggan 41–42 & 52).

(3) Maksud kebajikan mesti diambilkira bersifat luas dan semua faktor yang perlu diambilkira mesti dipertikaikan terhadap satu sama lain untuk tiba kepada satu keputusan. Adalah mustahil untuk meletakkan apa-apa yang spesifik oleh kerana keadaan setiap kes amat berbeza. Jawapan untuk soalan ketiga bersifat positif (lihat perenggan 58).

(4) Semua persoalan di hadapan mahkamah berkisarkan hak perayu dan kesahan pengambilan anak angkat. Aspek penukaran agama J kepada

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agama Islam tidak disentuh. Oleh demikian mahkamah enggan melayan isu terakhir yang ditimbulkan oleh perayu (lihat perenggan 73).

(5) Mahkamah Rayuan terkhilaf kerana membatalkan perintah kedua Mahkamah Tinggi berkaitan membetulkan sijil kelahiran J untuk menggambarkan perayu sebagai bapa J. Bahagian perintah Mahkamah Rayuan ini telah diketepikan dan perintah kedua yang telah diberikan oleh Mahkamah Tinggi dihidupkan semula (lihat perenggan 74).]

Notes:

For cases on adoption, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3271–3286.

For cases on legitimacy, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3483–3489.

Cases referred to

Awang Tengah AG Amin v Sabah Public Service Commission & Anor [1998] MLJU 10; [1998] 2 CLJ Supp 409, HC (refd)

Baby M (an infant) (adoption: consent), Re [1994] 2 MLJ 635, HC (refd)

Balasingam & Paravarthy, infant Kannamah, Re v Palani [1970] 2 MLJ 74 (refd)

J and another v C and other [1970] AC 668, HL (refd)

Jainah binti Semah v Mansor bin Iman Mat and another [1951] MLJ 62 (refd)

Khor Liang Keow v Tee Ming Kook [1995] 4 MLJ 629; [1996] 2 CLJ 631, HC (refd)

Loh Toh Met, decsd Kong Lai Fong & Ors, Re v Loh Peng Heng [1961] MLJ 234, CA (refd)

Low Pak Houng v Tan Kok Keong [1998] 2 MLJ 322; [1998] 1 CLJ Supp 357, HC (refd)

Low Pek Nai v Koh Chye Guan [1995] 1 MLJ 238, HC (refd)

Sinnakaruppi a/p Periakaruppan v Bathumalai a/l Krishnan [2001] 6 MLJ 29; [2001] 2 CLJ 435, HC (refd)

T v O [1993] 1 MLJ 168, HC (refd)

Tan Siew Kee v Chua Ah Boey [1988] 3 MLJ 20, HC (folld)

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)

Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (refd)

Wong Pot Heng & Anor v Zainal Abidin Putih & Anor [1990] 2 MLJ 410, SC (refd)

Legislation referred to

Adoption Act 1952 s 31

Court of Judicature Act 1964 s 96(a)

English Children Act 1989 [UK]

Federal Constituition art 12(4)

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Guardianship of Infants Act 1961 ss 1(3), 1(3)(a), 5, 5(1)
Registration of Adoptions Act 1952 ss 5, 6, 6(1), (2), 8, 10, 10(1)
Registration of Adoptions Regulation 1952
Rules of the Federal Court r 47

Appeal from:
Civil Appeal No. W-01-65 of 2008 (Court of Appeal, Putrajaya)

YN Foo (Kiran Dhaliwal with her) (YN Foo & Partners) for the appellant.
Sharmini Jayan (Ravichandran and Ng Chung Yee with her) (Seah Balan Ravi & Co) for the respondents.

James Foong FCJ (delivering judgment of the court):

INTRODUCTION

[1] To fully appreciate the four questions posed to us, we shall start by stating the facts of this case. We shall describe the parties as they were in the court of first instance.

BACKGROUND

[2] The plaintiff is an American citizen. In December 1998, when he was in Malaysia, he met the first defendant, a Malaysian of Chinese origin. They started dating. Sometime in April 1999, the first defendant travelled to the United States of America to visit the plaintiff. There at the 'Little Church of the West', in Las Vegas, she got 'married' to the plaintiff. After that, the first defendant returned to Malaysia while the plaintiff remained in America.

[3] On 21 March 2000, the first defendant gave birth to a boy in Kuala Lumpur. She gave him an English name followed by the Chinese name but for the sake of the child we shall refer him as J. The first defendant must have indicated to the plaintiff that J is his son for soon after birth, the plaintiff travelled to Malaysia to be with the first defendant and J. He even attended J's christening ceremony. Subsequently, the plaintiff claimed to have travelled to Malaysia on a number of occasions to see the first defendant and J and at one time all three travelled to Manila. Initially, according to the plaintiff, he had planned for the first defendant and J to live in America but when it became apparent that the first defendant was reluctant, he dropped the idea. Nevertheless, he continued to send money to the first defendant for herself and J.

[4] Sometime in September 2004, intending to set up a more structured maintenance scheme for J, the plaintiff engaged the services of a firm of solicitors. Through them, he discovered that in J's birth certificate he is not

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named the father. Instead, it was 'Engelbertus Antonious Marius Van Hoek' ('Bart'). Prior to this, the plaintiff claimed that the first defendant had informed and shown to him a copy of J's birth certificate listing his name as the father of this child. He later discovered that this document was tampered with to make it appear that he was the father. Why this was done will soon become apparent as the saga unfolds.

[5] When the plaintiff realised this, he secured a profiling test for J and himself. It confirmed that he is the natural father of J. But things did not stop there. In the course of this, he discovered that J was adopted by the second and third defendants on 18 February 2004 and they have subsequently converted him into the Islamic faith. J's name was changed to an Islamic name.

[6] The second defendant is the sister of the first defendant. She has converted to the Islamic faith when she married the third defendant, a Muslim. Initially, the second defendant had assisted the first defendant in looking after J when the latter went to work. Eventually, according to the second and third defendants, J was left to their care and ultimately, the first defendant consented to their adoption of J. This, however, was denied by the first defendant who insisted that at no time had she relinquished custody of J to the second and third defendants though she admitted, except when she was at work. As to the adoption, she maintained that she has never consented to it nor to the conversion of J to the Islamic faith and the change of his name.

[7] Enraged by this, both the plaintiff and the first defendant took out originating summonses against the second, third, fourth and fifth defendants. In the plaintiff's application, he requested that:

(a) he be declared the biological father of J;

(b) the fourth and fifth defendants (who are the Registrar of Births and Deaths and Registrar of Adoptions respectively) rectify their respective registers to name him as the father;

(c) the fourth defendant rename J to his original name;

(d) the adoption of J by the second and third defendants be declared null and void;

(e) he be granted sole custody and guardianship of J;

(f) the conversion of J to the Islamic faith be declared null and void;

(g) the third and fourth defendants to deliver J to him; and

(h) he be allowed to take J out of jurisdiction.

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[8] The first defendant on the other hand claimed almost identical prayers regarding adoption and conversion but demanded custody, care and control of J be granted to her instead. A

[9] The second and third defendants challenged the requests of both the plaintiff and the first defendant, while the fourth and fifth defendants maintained that the adoption and conversion were according to procedure. B

[10] Now let us return to unfold the mystery surrounding some of the first defendant's actions that led to this complication. According to the first defendant herself, when she met the plaintiff she was married to a Malaysian known as John Kung from Sarawak with whom she had a daughter. The marriage did not work out and while waiting for her divorce to come through, she met Bart, a Dutch national. She had a son by him whom she named W. But instead of putting Bart as the father of W in W's birth certificate, she named John Kung instead. While living with Bart she had an affair with the plaintiff resulting in the birth of J. And here again, instead of listing the plaintiff as the father, she named Bart as the father in J's birth certificate. The first defendant admitted travelling to America and underwent a so called marriage ceremony in Las Vegas with the plaintiff. She dismissed this as a real marriage. According to her, it was more of a pledge of love in an informal setting to a prelude for a formal wedding in Malaysia in the future. C D E

[11] As to why she has named Bart as J's father in J's birth certificate, the first defendant claimed that it was done at the request of Bart. At that time, she was having a difficult relationship with Bart and there was a tussle with him over the custody of W. To pacify Bart, she acceded to Bart's request that he be named father in J's birth certificate as an indication that she would marry him. We find this logic rather strange but then, in human intercourse, strange things which defy all logic do happen. Eventually, the relationship with Bart did not work out and W followed Bart while the first defendant took J away. Just to complete this part of the saga, Bart also had a paternal test done on W which confirmed that W was his child. This came about through a legal process instituted by Bart against the first defendant and by coincidence Bart's solicitors were the same as those engaged by the plaintiff. And when notes were exchanged in these two cases, the plaintiff became acquainted with the intimate details of what transpired behind his back, so to speak. This caused him to accuse the first defendant of deception and being unfit to have custody of J. Regarding the falsification of J's birth certificate to bear the plaintiff's name as the father, the first defendant explained that this was done for the purpose of J's admission to an international school. F G H I

[12] In the High Court, the first defendant eventually agreed not to contest against the plaintiff for the custody of J. Instead, she joined the plaintiff in

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challenging the second and third defendants, as well as the third, fourth and fifth defendants over the adoption and conversion of J.

[13] We now turn to the version proffered by the second and third defendants. Aside from their insistence that the first defendant had left J to their care while the first defendant was busy with her work and social activities, they claimed that the first defendant had consented in writing to their adoption of J. This was in a statutory declaration signed by the first defendant. This document was tendered as an exhibit and is found at p 881 of Vol 3, Part B of the appeal record. The title of this document declares:

SURAT KEIZINAN PENGANGKATAN AKUAN BERKANUN

(Translated: Statutory Declaration (Letter for Permission to Adopt)

[14] Below are particulars such as the name of the first defendant and her address. The same goes for J and the second and third defendants. Bart's name appears as father but his whereabouts is stated as 'TIDAK BOLEH DIHUBUNGI' (translated: cannot be contacted). This declaration has a signature at the bottom left and right and then further down is a signature of the commissioner for oath and his stamp bearing his name and address.

[15] In this statutory declaration, the first defendant has affirmed that she consented to the adoption of J by the second and third defendants.

[16] The first defendant has vehemently denied that she signed this declaration and asserted that the first time she became aware of this was when she received a call from an officer of the fifth defendant that the plaintiff was attempting to cancel J's adoption.

HIGH COURT

[17] In the High Court, both the plaintiff's application and that of the first defendant were heard together. Regrettably, all parties agreed that these applications be tried on affidavit evidence when it was obvious, from the contents of the documents filed, there were serious dispute as to facts. Before us now, the plaintiff is contending that the learned High Court judge has erred in making a finding based on contentious facts asserted in the affidavits. We shall deal with this later.

[18] After deliberation, the High Court allowed the plaintiff's first and second prayer: a declaration that he is the natural father of J and that the birth certificate of J be rectified to reflect this. The rest were dismissed.

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[19] As regards to the first defendant's application, it was dismissed.

[20] The reasons given by the High Court can be summarised as follows:

(a) The DNA test positively confirmed the plaintiff as the natural father of J. The first defendant herself has also admitted this. Further, Bart, in his statutory declaration, has acknowledged that he is not the natural father of J. On top of this, the second and third defendants do not dispute this fact.

(b) As to the plaintiff's contention that the Registration of Adoptions Act 1952 (Act 253) does not apply to Muslims, there is no express provision therein to declare this. Thus, the second and third defendants were entitled to register the adoption of J under this Act.

(c) As the first defendant is not a truthful witness, there is 'little or no weight to be attached to' the claim by the first defendant that she did not consent to this adoption by the second and third defendants 'especially in the light of other evidence as to her conduct'.

(d) The plaintiff's consent to the registration of the adoption of J is unnecessary since the Guardianship of Infants Act 1961 (GIA) though bestowing upon the plaintiff, as the father of the child, equal right as that of the mother, is not applicable to an illegitimate child like J.

(e) The second and third defendants having fulfilled all the conditions and requirements under s 6 of Act 253 were qualified to apply for the registration of the adoption of J.

(f) The fifth defendant was duty bound to accept the statutory declaration of the first defendant consenting to the adoption of J by the second and third defendants 'especially when the would be adoptive mother is the sister of the child's natural mother'.

COURT OF APPEAL

[21] Dissatisfied with the decision of the High Court, both the plaintiff and the first defendant appealed to the Court of Appeal. The Court of Appeal not only dismissed these appeals but also reversed the order of the High Court granting the plaintiff's second prayer: that the birth certificate of J to be rectified. The plaintiff's first prayer was maintained by the Court of Appeal.

[22] The reasons given by the Court of Appeal were:

(a) The purported marriage between the plaintiff and the first defendant in Las Vegas is void since the first defendant, at that material time, was still married to John Kung.

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(b) Act 253 applies to Muslims.

(c) The finding by the High Court that the first defendant had given her consent to the second and third defendants to adopt J should not be disturbed.

(d) As the plaintiff was not listed as the natural father of J at the time when the application for adoption was made, his consent was not relevant.

(e) The fifth defendant had exercised his discretion in dispensing with the consent and presence of any parent during the adoption proceeding of J. Though Bart was named as J's father, he was not contactable. And this was declared in the first defendant's statutory declaration.

(f) The granting of any other prayers requested by the plaintiff 'would not be in the best interest of the child concerned'.

QUESTIONS POSED

[23] The following were the questions posed to this court:

(a) Whether the appellant father's (plaintiff) consent should be obtained for the registration of adoption of his son under the Registration of Adoptions Act 1952.

(b) Whether s 6 of the Registration of Adoptions Act 1952 should be read such that where there are two parents living, both parents' consent should be sought for the registration of adoption of a child under the Registration of Adoptions Act 1952.

(c) In dispensing with consent of any parent to the registration of the adoption under the Registration of the Adoptions Act 1952, the welfare principle which the Registrar must apply in exercising his discretion under the proviso to s 6 of the Registration of Adoptions Act 1952 is the welfare of the child in adoption cases and not custody cases.

(d) Whether the rights of the appellant (plaintiff), the biological father, remain and are not extinguished despite the registration of the adoption of the child.

Question 1: whether the appellant father's (plaintiff's) consent should be obtained to the registration of adoption of his son under the Registration of Adoptions Act 1952

[24] Miss Foo, counsel for the plaintiff, argued that the plaintiff's consent should have been sought before the fifth defendant approves the registration of J's adoption. She pointed out that under the Guardianship of Infants Act 1961 (GIA), (which came into effect on 1 October 1999), the father and mother have the same rights and authority over the child. This is conferred by s 5(1) of the GIA which says:

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> In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law 'as the law allows to a father, and the rights and authority of mother and father shall be equal'. (Prior to 1 October 1999, such rights and authority were only accorded to the mother).

[25] When such rights and authority are conferred upon the plaintiff as the natural father of J, then according to Miss Foo the plaintiff's consent should be sought. Since this never took place, J's adoption is invalid.

[26] Mr Ravi, counsel for the second and third defendants, however argued that GIA does not apply to an illegitimate child. And this can be found in s 1(3) of the GIA as well as in a number of decided authorities.

[27] Section 1(3) of the GIA reads:

> Nothing in this Act shall apply in any State to persons professing the religion of Islam until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that:
>
> (a) Nothing in this Act which is contrary to the religion of Islam or the custom of the Malays shall apply to any person under the age of eighteen years who professes the religion of Islam and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion.

[28] The issue here is not religion as both the plaintiff and the first defendant are non-Muslims. The contention is the legitimacy of J: if J is illegitimate, would GIA confer upon the plaintiff a parental right over J and, if so, whether the plaintiff's consent was required for the purpose of J's adoption.

[29] It is not in dispute that J is illegitimate. When he was born, both the plaintiff and first defendant were not married to each other. It was decided In *Re Balasingam & Paravathy, infants Kannamah v Palani* [1970] 2 MLJ 74, that the court has no jurisdiction to entertain an application by the natural mother for the custody of her illegitimate child under GIA. The reason was there being no provision under this Act to provide for an illegitimate child, and this 'proposition is fortified by the respondent's arguments on the correct construction of the words 'father' and 'mother' in ss 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v Galloway* it is safer to say that 'infant' means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words 'father' or 'mother' or 'infant' can be

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construed to mean illegitimate infant or the de facto parents of illegitimate children, it must be concluded that the Act does not apply to 'illegitimate children'.

[30] This proposition was followed in *T v O* [1993] 1 MLJ 168, a decision of the High Court where Shankar J (as he then was) said:

> Of course in a case where illegitimacy is clear, and there never was any question of a marriage either de facto or dejure. I would respectfully agree with the court in *Re Balasingam and Paravathy*, but only to the extent that the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively, in the absence of a court order.

[31] In another High Court case of *Low Pak Houng v Tan Kok Keong* [1998] 2 MLJ 322; [1998] 1 CLJ Supp 357, Aziz J (as he then was) viewed it in this manner:

> Subsection (2)(a) (formerly s 1(2)) does not prove that Parliament intended to change the law from what it had been under the 1935 Ordinance (Guardianship of Infants Ordinance of the Straits Settlements). Certainly it does not prove that Parliament intended that under s 5 of the 1961 Act the father of an illegitimate child should be the guardian of the child. For that express words are necessary.
>
> Neither ought the omission of the word 'lawful' from s 6 to be construed as denoting that Parliament intended to effect a change in the law from what it had been under the 1935 Ordinance. As I said, the happy circumstance of the presence of the word 'lawful' in s 6 of the Ordinance is an indication that s 5 also intended to refer to the father of a legitimate child. The omission of the word 'lawful' from s 6 in the 1961 Act ought not be construed as denoting a change of intention. It is not safe to so construe. For such radical change in the law, there must be express words to give effect to it.
>
> I am therefore of the view that s 5 of the 1961 Act is intended to apply to a lawful father and that accordingly the father of an illegitimate cannot claim guardianship under it.

[32] Similar ruling was also made in the case of *Khor Liang Keow v Tee Ming Kook* [1995] 4 MLJ 629; [1996] 2 CLJ 631, by Zulkefli Makinudin JC (as he then was).

[33] There are however two High Court decisions which disagree with the above. They have ruled that GIA applies to an illegitimate child. Their reasons are as follows.

[34] In *Low Pek Nai v Koh Chye Guan* [1995] 1 MLJ 238, at p 240, Hishamudin J (as he then was) contended that:

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With greatest respect to the views of the learned judge in *Re Balasingam*, in the present case, I propose to adopt a different view. Unlike the English Acts, our Act does refer to illegitimate children and such reference can be found in the application section. Section 1(3) states:

The above provision, it will be noted, contemplates that the State Legislature may provide for the Act to be applicable to Muslim children regardless of whether the child is legitimate or illegitimate to the extent that such an application is not contrary to Islamic law. Now, if this provision contemplates such an application as regards to Muslim children, then, in my view, the Act must apply to children, generally legitimate or illegitimate.

I, therefore, rule that the Act applies also to illegitimate children and that, in the present case, I have jurisdiction to hear the application.

[35] The next is the decision by Jeffery Tan J (as he then was) in *Sinnakaruppi a/p Periakaruppan v Bathumalai a/l Krishnan* [2001] 6 MLJ 29 ; [2001] 2 CLJ 435 at p 439. The following were his views:

Indeed, in the light of the latest amendments to the GIA (see Guardianship of Infants (Amendment) Act 1999 effective 1 October 1999), and the substitution of the former s 5 by an altogether new s 5 providing for equality of parental rights, there is less reason to doubt that the GIA in the present form does not apply to illegitimate children. Presently, the position in England is that 'the statutory provisions relating to orders for custody of, and rights of assess to, a minor on the application of a mother or father apply in relation to as a minor who is illegitimate as they apply in relation to a minor who is legitimate' (*Halsbury's Laws of England*, (4th Ed), para 548). Perhaps it would require further study, but *Low Pek Nai v Koh Chye Guan* might have fortuitously and correctly stated the law.

[36] As correctly observed in *Re Balasingam*, there is a 'remarkable absence of any reference to illegitimate children other than in the above mentioned s 1 (2)(a) (now changed to s 1(3)(a)'. But then, one cannot ignore the fact that this word 'illegitimate' appears in s 1(3)(a) of the GIA 1961. Undeniably, this word here is used for the purpose of excluding all mothers who professes or professed the Islamic faith from the benefits of the provisions of this Act. But why did Parliament single out an illegitimate child of a mother who professes or professed the Islamic religion? If Parliament had intended this Act to apply only to a legitimate child it could have kept silent on the issue of legitimacy in this section like in the remaining part of the Act. There is no necessity to express this to cover an illegitimate child in s 1(3)(a) . By specifically highlighting this to say that 'in the case of an illegitimate child' it must have been intended, in our opinion, to be a reminder, not to exclude those who are illegitimate. Thus, this Act should apply to all children, legitimate as well as illegitimate. Otherwise, we see no reason, why an illegitimate child is singled out for mention in s 1(3)(a) of the GIA.

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[37] In *Re Balasingam*, the rationale for excluding an illegitimate child, despite the presence of the word 'illegitimate' in s 1(2)(a) (now s 1(3)(a)) GIA 1961, was because the courts in England had interpreted the English Guardianship Acts of a 'father' and 'mother' to be only those lawfully married; thus their child is legitimate. And this was used in that case to support the proposition that it is the same in Malaysia. But this approach plainly ignores the fact that we have in Malaysia our own GIA which contains s 1(3)(a) . And this provision specifically expresses 'in the case of an illegitimate child'. We are of the view that there is no requirement for us to look further than this provision especially to s 5 of the GIA, like what was done in *Low Pak Houng v Tan Kok Keong* to decide on whether the GIA includes or excludes an illegitimate child. We conclude that the wordings of s 1(3)(a) of the GIA is sufficient to imply that this Act applies to an illegitimate child.

[38] Possessing such right and authority equivalent to that of the first defendant over J is one thing but whether the consent of the plaintiff was required for the purpose of the registration of this adoption is another. At the time when the second and third defendants made their application to register the adoption of J, the plaintiff was not known to be the biological father of J. J's father was listed in J's birth certificate as Bart. It was only after the adoption was made and subsequent DNA test conducted, that the plaintiff was confirmed as the biological father of J. If the plaintiff was not known or confirmed to be the father of J when the application for the registration of the adoption was made, then his consent was irrelevant. By this deduction, our answer to the first question is in the negative.

Question 2: whether s 6 of Act 253 should be read such that where two parents are living, both parents' consent should be sought for the registration of the adoption of a child under this Act

[39] To answer this, we turn to s 6 of the Act 253 which reads:

> Registration of de facto adoptions
>
> 6 (1) Where at the date when application for registration is made any child under the age of eighteen years who has never been married is in the custody of, and is being brought up, maintained and educated by any person, or by two spouses jointly, as his, her or their own child under any de facto adoption, and has for a period of not less than two years continuously and immediately before the date of such application been in such custody and has been so brought up, maintained and educated, the Registrar may, upon the application, in the form in the First Schedule, of such person or spouses, register the adoption if —
>
> (a) such person or spouses and the child shall appear before the Registrar and shall produce to the Registrar such evidence either oral or documentary as may satisfy the Registrar that such adoption took place;

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(b) the parents or one of the parents, or, if both parents are dead or if neither of the parents is within Peninsular Malaysia, any guardian of the child shall appear before the Registrar and express consent to the adoption;

Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signified his consent by statutory declaration; and

(c) the prescribed fees are paid.

(2) The Registrar shall register an adoption by entering the particulars thereof in the register.

[40] According to Miss Foo, this provision demands:

(a) If both parents are alive, both must appear before the registrar to express their consent to the adoption.

(b) If the is only one parent (ie the other no longer alive) then he or she shall appear before the registrar and express his or her consent to the adoption.

(c) If both parent are dead or if neither of the parents is within West Malaysia, then the guardian, if any, shall appear before the registrar and express consent to the adoption.

This 'would give effect to all of the words' in this section as required in the construction of a statute.

[41] With respect, we do not subscribe entirely to this interpretation. Aside from the other qualifications demanded in s 6 of Act 253, regarding the appearance before the registrar (not at this stage taking into account the proviso) the following are required:

(a) the person or the spouses who wish to adopt the child must together with the proposed child to be adopted appear before the registrar;

(b) 'the parents or one of the parents' must appear to express his/her or their consent to the adoption; or if both are dead or if neither of them are within Peninsular Malaysia, then any guardian of the child can appear to give his consent to the adoption.

[42] Regarding the second category concerning 'or one of the parents' can appear before the registrar, we cannot see how Miss Foo can interpret this to add a qualification that the other parent is 'no longer alive'. There is just no word or words to this effect in this section. This section plainly says 'or one of the parents'. With such description, it simply means any one parent without the need to prove that the other is either dead or cannot be found. When words here are precise and unambiguous then the literal and strict construction rule

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must apply. We cannot read or imply into the laws what is not there — see *Wong Pot Heng & Anor v Zainal Abidin Putih & Anor* [1990] 2 MLJ 410.

[43] But in this case neither parents of the child appeared. According to the fifth defendant he invoked the proviso under s 6(1) of the Act 253 since he was satisfied that 'in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signified his consent by statutory declaration'.

[44] Miss Foo however argued otherwise. She is of the view that the fifth defendant was required to do more than just peruse the documents before he can exempt the presence and consent of the parent or parents. She supported this argument by claiming that s 10 of the Act 253 requires the fifth defendant to keep a note-book and must record 'all evidence taken by him (Registrar) in any proceeding under this Act' in this note-book — s 5 of the Act 253. This requirement implies that the fifth defendant is required to investigate before he exercises his rights of exemption.

[45] To deal with this, we first look at s 10(1) of the Act 253 which says:

> If the Registrar is not satisfied of the truth of any statement made to him he may refuse to register the adoption or if he requires evidence with regard to any particulars required to be registered he may postpone registration and he may call for any further evidence that he thinks necessary;
>
> Provided that the Registrar shall record in the Registrar's note-book his reasons for any such refusal or postponement

[46] And then in s 5 of the Act 253:

> Every Registrar appointed under this Act shall keep a register in the form in the Second Schedule and he shall enter therein the particulars to be registered concerning the adoption and he shall also keep a book called the Registrar's note-book in which he shall record in his own hand all proceedings in respect of the registration of any adoption, the details of the identity of the adopted child, the name of the person, 'adopting it, the name of the person if any, consenting to the adoption and all evidence taken by him in any such proceeding under this Act'.

[47] These provisions firstly cater for situations where the fifth defendant is dissatisfied with the truth of any statement made to him. Secondly, it records all particulars of the registration for the adoption. So before the fifth defendant records his reason for refusing to register the adoption in his notebook, he must foremost be dissatisfied. But in this case, there is no evidence that he was dissatisfied. Even if he was dissatisfied, these two sections of the Act 253 do not,

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in our opinion, confer upon him a duty to investigate the truth of the statement presented to him. All that is necessary is to refuse registration. Further, under s 8 of the Act 253:

> (1) Every person who gives evidence before the Registrar shall be bound to state the truth and to answer truthfully all questions which the Registrar may put to him.
>
> (2) Any person who gives any evidence in any enquiry under this Act which he knows to be untrue, or who does any other act, which if done in a judicial proceeding would be punishable under Chapter XI of the Penal Code [Act 574], shall be punishable on conviction as provided in that Chapter in the same way as if the act had been done in or in relation to a judicial proceeding.

[48] We shall now turn to the issue of the authenticity of the statutory declaration. The significance of this declaration is that the fifth defendant can dispense with the requirement of the appearance of the parents or one of them and their or his consent to the registration of the adoption. As we have expressed earlier, the trial judge ascertained the truth of this by preferring one version in the affidavit to that of another instead of deciding this by way of *viva voce* evidence. In the light of this we return to what was said by the Privy Council in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433:

> if allegations are made on affidavits by the petitioner and those allegations are creditably denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

[49] Using this as a guide, we first separated the disputed facts from the undisputed. What is disputed is the claim by the first defendant that she did not sign this statutory declaration whilst the second and third defendants insisted that she did so voluntarily. There is however no dispute that such a document existed and that it was presented to the fifth defendant. Further, there was no dispute that this document bears two signatures which were attested by the commissioner for oaths and the name of the person who had signed this document was the first defendant. Adding to this, there is no dispute that there was a commissioner for oaths and he too signed on this document as a witness to the person who executed this document. Also not in dispute is the fact that this commissioner for oaths had affixed his stamp bearing his name and registration on this document. Based on these undisputed facts and ignoring those that are disputed, a finding can be reached that such a document existed bearing the signatures of the maker who bears the first defendant's name and her signatures were attested to by a registered commissioner for oaths.

[50] Once this document was presented to the fifth defendant, his duty was

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to exercise his discretion granted to him by the proviso of s 6(1) of the Act 253. In doing so he 'must apply its (his) own mind to the facts and circumstances of each case and come to its (his) own decision. If authority acts without applying its (his) mind to the case before it, then the action or decision taken by it will be bad because the authority has not exercised its discretion' — see Professor MP Jain in his text *Administrative Law of Malaysia and Singapore*, (3rd Ed), (as quoted in *Awang Tengah AG Amin v Sabah Public Service Commission & Anor* [1998] MLJU 10; [1998] 2 CLJ Supp 409 at p 431). Aside from this, he must take into account the following factors: first, all circumstances of the case; second, is that it is just and equitable to do so; and third, for the welfare of the child to do so.

[51] From what we have discussed earlier, we are of the view that the fifth defendant had taken into account the relevant factors and applied them to the facts of this case before coming to a decision. For this, we see no reason to interfere with what he has decided as it was done in accordance with the law.

[52] For reasons aforesaid, our answer to the second question is in the negative.

Question 3: In dispensing with consent of any parent to the registration of the adoption under the Registration of the Adoptions Act 1952, the welfare principle which the registrar must apply in exercising his discretion under the proviso to s 6 of the Registration of Adoptions Act 1952 is the welfare of the child in adoption cases and not custody cases

[53] According to *Halsbury's Laws of England*, (4th Ed), Reissue (Mackay edition), para 443 the term, 'welfare principle' is a set of factors used when 'a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration'. In the English Children Act 1989, under the heading 'welfare of the child' is a set of factors that must be taken into account when deciding on such cases. These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved. Thus, this term 'welfare principle' relates to certain factors to be considered and their priority during deliberation in such cases.

[54] This difference in application is illustrated in *Re Baby M (an infant) (adoption: consent)* [1994] 2 MLJ 635, where Visu Sinnadurai J said:

> One major problem confronting the courts has been the question of the welfare of the child. As stated earlier, the adoption proceedings, unlike the position in custody cases, the law provides that the welfare of the child is only one of the factors to be considered by the court; whereas in custody cases the welfare of the child is the main consideration.

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[55] But we are not here to consider priorities. We are dealing with registration of a de facto adoption of a child under Act 253 and under the proviso of s 6, the relevant factors necessary for consideration regarding dispensation are explicitly set out. It encompasses, as we have stated: all the circumstances of the case; it is just and equitable; and for the welfare of the child.

[56] And in respect of the welfare of the child, we would adopt what was stated by Chan Sek Keong JC (as he then was) in the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20 at p 21:

> The expression 'welfare' under s 3 of the Guardianship of Infant Act (Cap 122, 1985 Ed) is to be taken in its widest sense. It means the general well being of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well being. A loving parent with a stable home is conducive to the attainment of such well being. It is not to be measured in monetary terms.

[57] And when deliberating, the court should adopt 'a process whereby, when all the relevant facts, relationship, claims and wishes of parents, (and potential adopters) risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood' — Lord MacDermott in *J and another v C and others* [1970] AC 668 at pp 710-711 and *Halsbury Laws of England* (4th Ed), Reissue, (Mackay), para 443.

[58] As we have suggested, the meaning of welfare must be considered in the widest sense and all factors necessary to be taken into account must be weighed against one another to arrive at a decision. It is impossible for us to lay down any specifics since circumstances in each case are so infinitely varied where even decided cases as precedent has limited application. In this respect we answer the third question in the positive.

Question 4: Whether the rights of the plaintiff, the biological father, remain and are not extinguished despite the registration of the adoption of the child under the Registration of Adoptions Act 1952

[59] To answer this question we must first relate the difference between Registration of Adoptions Act 1952 (Act 253) and the Adoptions Act 1952 (Act 257).

[60] Both Acts were enacted in the same year and both relate to the adoption of a child. Generally, adoption made under Act 257 is referred to as the 'Court Adoption' whilst one under Act 253 is considered as a 'Registrar Adoption'.

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A This means an adoption under Act 257 must be made through a court process while an order for the registration of an adoption under Act 253 is made by the Registrar of Adoption (see s 6(2) of the Act 253).

B **[61]** The other major difference between the two methods of adoption is that Act 253 caters for a de facto adoption whilst an adoption order made under Act 257 includes adoption dejure. Thus, an application for adoption under Act 257 is more demanding and aside from other requirements, a notification to the Social Welfare Department of State is required before an C adoption order can be made. This is not required under Act 253.

[62] The most crucial difference between the two Acts lies in the effect of the adoption. Under Act 257, 'all rights, duties, obligations and liabilities of the D parent, guardian of the adopted child, in relation to future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the E adopted child was born to the adopter in lawful wedlock'. This provision is noticeably absent in Act 253. As the result of this, the Court of Appeal in *Re Loh Toh Met, desd, Kong Lai Fong & Ors v Loh Peng Heng* [1961] MLJ 234 at p 235 decided that an adoption under the Registration of Adoptions Ordinance (the forerunner of Act 253) confers no succession rights on the adopted child.

F

[63] In the course of argument here and below, questions were raised as to the objective and purpose of these two pieces of legislation passed in the same year and concern the same subject matter: adoption of a child. Concurring G with the views expressed in the courts below, we are of the opinion that Act 253 was enacted to cater for Muslims whose personal laws are repugnant to adoption yet it is a common practice for Muslims in this country to 'adopt' a child. This is reflected in s 31 of the Act 257 which declares that 'This Act shall not apply to any person who professes the religion of Islam …'. Support for this H view can be found in footnote 6 of para 140–073 in *Halsbury's Laws of Malaysia*, 2003 Reissue, Vol 8 which states:

> It should be noted that the Registration of Adoptions Act 1952 was intended for the use of Muslims. This is because Islam does not recognize adoption and in order to legitimize such customary practices, the adoption could be registered under this Act I so as to safeguard the right to custody of the adopted parents.

[64] And as the High Court in this case elaborated: without proper documentation, how else then can a Muslim couple who has taken upon

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themselves the care of a child go about doing simple routine things such as enrolling the said child into a school, or for the purpose of obtaining identity cards or even applying for passports?

[65] Having discussed earlier the difference between Act 253 and Act 257 and the objective and intention of Act 253, we shall now deal with the status of the adopted child, his adopted parent or parents and his natural parent or parents. This will have a bearing to the question posed.

[66] According to *Halsbury's Laws of Malaysia*, Vol 8, para 140.073:

> The Registration of Adoptions Act 1952 does not provide for any form of legal status to the adopted child. It merely provides for registration of the de facto adoption and recognises indirectly the right to custody of the adopted child and the continuing responsibilities of the adoptive parents to maintain and educate the adopted child.
>
> The adopted child will not have a right to inherit any property from the adoptive parents' estate should they die intestate unless property is given inter vivos as a gift. It may be arguable that an adopted child has the right to apply for provision under the Inheritance (Family Provision) Act 1971.
>
> The adopted child is not stated as being treated as a child of the adopter bom in lawful wedlock as in the Adoption Act 1952.

This view is shared by the Court of Appeal in this instant case when they said:

> Act 253 merely lends legal recognition to the de facto status of the adoptive parent having custody and being responsible for the care, maintenance and welfare of the adopted child.

[67] We agree with this statement. Though both Act 253 and Act 257 deal with adoption of a child, the effect of an adoption undertaken under Act 253 is limited. Unlike Act 257, 'all rights, duties, obligations and liabilities of the parent, guardian of the adopted child, in relation to future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was born to the adopter in lawful wedlock' is not provided under Act 253. Act 253 only caters for the registration of a de facto adoption and as such it only confers upon the adopter parent or parents a custodian right with responsibilities to care, maintain and educate the adopted child. Other than these, it confers none of those rights exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock as spelled out in Act 257.

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[68] Possessing such limited right over the adopted child, the plaintiff argued before us that 'this court should have no hesitation in declaring null and void and invalidating the order of registration of adoption made by the registrar'.

[69] We cannot see the logic in this submission. There must be a distinction between the rights of the adoptive parents over the child in an adoption registered under Act 253 and the validity of the adoption itself. It is certainly unacceptable to rule that just because the adopter parents under this Act have only custodian, care, maintenance and educational right over the child, the adoption is invalid by the appearance of a natural parent who demands it so. In our view, the adoption remains valid. It was properly registered after due process in accordance with the law. Unless it is set aside, and there is no creditable ground to do so here, it remains good in law.

[70] Now returning to the question before us relating principally to the rights of the plaintiff as the biological father of the child, we would like to begin by highlighting a passage from Professor Mimi Kamariah Majid's text on *Family Law in Malaysia* at pp 217–218. This is with the objective of shedding some light on the status of the natural parent or parents. Though this refers primarily to Muslims where, perhaps, all parties ie the child concern, the natural parent or parents and the adoptive parent or parents are Muslims (for which Act 253 was intended) it throws some light on the status of parties in this instant case.

> There is no adoption according to Islamic Law. If a man adopts a son or a daughter, the law does not confer on the adopted child the status or rights of a natural son or daughter. According to the Quran, if a person is not someone's real son, he does not become his natural son merely by virtue of a declaration …
>
> In the Malay community, customary adoptions prevail where a couple may adopt a child and may proclaim that the child is the son of or the daughter of the male spouse of the couple who adopts him or her. Despite this, the links between the child and his natural parents are never severed. A Muslim girl still needs to obtain the consent of her natural father, as her wall, or guardian for marriage, before she may get married, unless, of course, one of the exceptions to this requirement apply(ies). Similarly a Malay Muslim girl will always be considered as not belonging to the same muhrim as her adoptive father.

[71] While Act 253 is not restricted to Muslims since there is no provision to this effect (and see *Jainah binti Semah v Mansor bin Iman Mat and another* [1951] MLJ 62), we maintain that the legal rights of the natural parent or parents remain as conferred by law. This is based on the rational that an adoption under Act 253 confers upon the adopter parents only custodian, care, maintenance and educational right for the child. With this we answer the question posed to us in the positive.

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[72] Miss Foo in her written submission also raised the issue of the right of the third and fourth defendants to convert J to a Muslim. She argued that since the third and fourth defendants have only custodian right they have no right to convert J. She then went on to submit that under art 12(4) of the Federal Constitution, the plaintiff, as the natural parent of the J, possesses the right over the religion of a minor.

[73] But surprisingly, this issue is not reflected in the question posed to us. All questions before us are centred on the right of the plaintiff and the validity of the adoption to which we have answered. None touch on this aspect of conversion. Under r 47 of the Rules of the Federal Court 'the hearing of the appeal shall be confined to matters, issues or questions in respect of leave to appeal is granted'. Though we have stated in the recent case of *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25 that questions can be amended and added from those originally posed, there was no formal application before us to do so. As the question posed is necessary to identify the issue raised inclusion of other matter which has not been added to or included in the original question by way of amendment may cause confusion to the real issue required to be determined. Further, parties may not have come prepared to argue this. Though, as stated by us in *Terengganu Forest Products Sdn Bhd* that question framed is procedural but this process is still necessary to achieve the objective of s 96(a) of the Court of Judicature Act 1964. For this reason, we refuse to entertain the last issue raised by the plaintiff before us.

CONCLUSION

[74] In conclusion, we dismissed this appeal with costs. However, in view of our opinion expressed above, we accept that the Court of Appeal had erred in revoking the second order of the High Court in respect of rectifying the birth certificate of J to reflect the plaintiff as the father of J. We set aside this part of the order of the Court of Appeal and reinstate the second order granted by the High Court.

Appeal dismissed with costs.

Reported by Kanesh Sundrum